



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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**BOARD OF REVIEW
DECISION**

In the matter of:

Appeal number: **BR-113018**

CLAIMANT APPELLANT:
[REDACTED]

Hearings Docket # 537677

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rorie O'Connor, a review examiner of the Division of Unemployment Assistance (DUA), to deny the claimant a hearing on the agency's determination of eligibility. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On November 16, 2009, the agency determined that the claimant was not eligible for benefits. The claimant appealed this determination, but because the claimant's appeal was submitted beyond the ten-day appeal period, under G.L. c. 151A, § 39(b), her request for a hearing was denied. The agency notified the claimant of this denial in a determination as to timeliness issued on December 1, 2009.

The claimant appealed the timeliness determination. A hearing was held before a DUA review examiner. In a decision rendered on February 8, 2010, the review examiner concluded that the claimant failed to establish good cause for the late appeal, as required under 430 C.M.R. 4.14. The claimant appealed to the Board of Review. We accepted the claimant's application for review.

The issue on appeal is whether the claimant's mistaken belief that DUA's offices would be closed the day after Thanksgiving gave her good cause to file her appeal the following Monday, when she had not received the determination she was appealing until the day before Thanksgiving, and the document on its face appeared to require response on Thanksgiving Day.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety

1. On 10/01/09 the claimant filed a claim for unemployment benefits.
2. On 11/16/09 the claimant was mailed Form 3720 with information regarding her appeal rights.
3. The claimant promptly received the form at her correct address of record as established by the agency.
4. The claimant read and understood the notice. She then prepared the information to request an appeal.
5. The claimant believed the DUA offices to be closed from Thursday 11/26/09 through Sunday 11/29/09 due to the Thanksgiving holiday and the weekend.
6. The claimant made no attempt to confirm the closing of the offices.
7. On 11/30/09 the claimant submitted a request for an appeal by fax, 13 days after Form 3720 was mailed.
8. On 12/01/09 the claimant was mailed a "Determination As To Timeliness of Appeal denying her late appeal.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 39(b) provides, in pertinent part, as follows:

Any interested party notified of a determination may request a hearing within ten days after delivery in hand by the commissioner's authorized representative, or mailing of said notice, unless it is determined . . . that the party had good cause for failing to request a hearing within such time. In no event shall good cause be considered if the party fails to request a hearing within thirty days after such delivery or mailing of said notice. . .

The legislature intends that an aggrieved party have ten days to request an appeal from an agency determination, but that this period is to be extended for up to thirty days for good cause. The agency has promulgated regulations, which illustrate examples of what shall constitute good cause for a late appeal. 430 CMR 4.14 provides, in relevant part, as follows:

The Commissioner may extend the ten day filing period where a party establishes to the satisfaction of the Commissioner or authorized representative that circumstances beyond his or her control prevented the filing of a request for a hearing within the prescribed ten day filing period. Examples of good cause for a failure to file a timely request for a hearing include, but are not limited to, the following:

- (1) A delay by the United States Postal Service in delivering the Commissioner's determination.

Although the disqualification notice was mailed on November 16, 2009, Exhibit 3 shows that the claimant informed the agency that she did not receive the notice until November 25, 2009, a day before Thanksgiving.¹ Under the ten-days-to-respond rule, the claimant's appeal would have been due to be filed on November 26, 2009, which was Thanksgiving Day. Under the Standard Adjudicatory Rules of Practice and Procedure, the last date to file an appeal must be extended to the next business day following a Saturday, Sunday, legal holiday, or any other day on which the office of the Agency is closed. 801 CMR 1.01(4)(d).

There is no evidence that the claimant was familiar with this regulation, but she appears to have had a common sense understanding of what it is intended to achieve. Thus, she knew that she could not file her appeal on Thanksgiving Day and needed to do so on the next business day afterwards. However, she mistakenly thought that the DUA's offices were closed on the Friday after Thanksgiving, and she, therefore, waited until the following Monday, November 30, 2009, to file her appeal. In fact, it was due the Friday after Thanksgiving, November 27, 2009, which under the arcane rules of the above-cited regulations was one "day" before she actually filed it.

In our view, the claimant's mistake of fact as to what the DUA's business hours were and, consequently, when her appeal was due was entirely reasonable and understandable. We conclude as well that it gave her good cause for late filing, particularly under the circumstances of her not having even received the determination that she was appealing until the very day before its ostensible due date.

We have had occasion before to comment on the opaque and inscrutable character of some of the DUA's business forms, and perhaps none is less easily understandable to a lay reader than the "Notice of Disqualification" form that the claimant was appealing in this case. Not only is much of the critical language in this document placed in the minuscule font size so beloved by disclaimers of warrantees and drafters of contracts of adhesion, but the most important piece of information it contains – the date when the recipient must file her appeal – is not actually even shown but rather must be calculated by the reader by adding ten days to the document's professed mailing date.

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director, DET, 64 Mass. App. Ct. 370 (2005).

We think that the inherent problems of the document itself as a medium of communication of important information, coupled with the complexities of how holidays and other non-working days are treated with respect to due dates, under 801 CMR 1.01 (4)(d), provide ample justification for what was, at the end of it all, no more than a harmless and *de minimis* error of timing by the claimant. See Khodaverdian v. Commissioner, DET, 39 Mass. App. Ct. 414 (1995) (employer had good cause for filing a wage and separation form two days late when the mistake causing lateness was slight and the error harmless, while the deprivation of right that would occur if the late filing was not accepted was significant and conclusive). See also Haefs v. Director, Division of Employment Security, 391 Mass. 804 (1984) (in light of its legislative purpose, the unemployment insurance statute must be construed liberally, and, therefore, a claimant who makes good faith effort to comply with the agency's requirements or shows good cause for failure to do so will not be denied benefits).

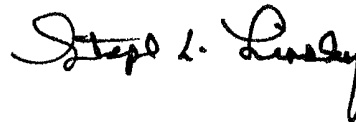
We, therefore, conclude as a matter of law that the claimant had good cause for failure to file a timely request for a hearing, within the meaning of G.L. c. 151A, § 39(b).

The DUA review examiner's decision is reversed. The claimant is entitled to a hearing on the merits of the agency's determination dated November 16, 2009.

BOSTON, MASSACHUSETTS
DATE OF MAILING - July 28, 2011



John A. King, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Sandor J. Zapolin declines to sign the majority opinion.